

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COUNTY OF HENNEPIN

In the Matter of the Claim of
Dr. John Jesme for Relocation Benefits

**FINDINGS OF FACT,
CONCLUSIONS,
AND ORDER**

The above matter came on for hearing before Administrative Law Judge Linda F. Close on December 11, 2009. The OAH record closed on January 8, 2010, upon receipt of post-hearing reply briefs.

Jon W. Morphew, Schnitker & Associates, appeared on behalf of Dr. John Jesme (Claimant).

Rick J. Sheridan, Assistant Hennepin County Attorney appeared on behalf of the County of Hennepin (the County).

STATEMENT OF THE ISSUE

At the time the County acquired a parcel of property located at 2305 Lowry Avenue North, Minneapolis, Minnesota, did the Claimant operate an independent business at the site, thereby entitling him to reestablishment benefits pursuant to Minn. Stat. ch. 117 and 42 U.S.C. 4601, *et seq.*?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. More than a decade ago, Hennepin County undertook a public works project to rebuild Lowry Avenue through north Minneapolis and to redevelop commercial areas along that part of the avenue. The project required acquisition of certain buildings, including one owned by Dr. Greg Olson, a chiropractor whose practice was located at 2305 Lowry Ave. N. in Minneapolis, Minnesota (the Lowry Avenue location).¹

¹ Testimony of Carol Lezotte-Anderson; Test. of Claimant. Ms. Lezotte-Anderson testified that she worked on the project for ten years.

Dr. Olson operated his practice as Northside Chiropractic Clinic (NCC) at the Lowry Avenue location until the County acquired the property in the latter part of 2007.²

2. The Claimant is a doctor of chiropractic who began practicing following his graduation from Northwestern College of Chiropractic in 2001. In 2003, the Claimant began a training and mentoring program at NCC under Dr. Olson's tutelage. NCC was then still located at the Lowry Avenue location.³

3. Initially, the Claimant entered into a six-month contract with NCC as an employee. During the first three months of the program at NCC, NCC treated the Claimant as an associate. NCC paid the Claimant either an hourly wage or a percentage of collections, whichever was greater. During the final three months of the initial six-month period, NCC paid the Claimant based solely on a percentage of collections of fees for the Claimant's services. During the initial six-month period, NCC paid the Claimant's malpractice insurance by withholding from the Claimant's paychecks amounts for that purpose.⁴

4. When the six-month initial contract ended, the Claimant entered into an Independent Contractor Agreement (ICA) with NCC whereby NCC would pay the Claimant a commission based on a schedule.⁵ Operating expenses for rent, utilities, advertising, and staff were included in the commission calculation, although the amounts deducted for these items were not specified in the ICA. The ICA ended after 180 days. Thereafter, until March 2, 2007, the Claimant entered into a new 180-day ICA with NCC every six months, in September and March. On March 2, 2007, the ICA had a 90-day term, rather than 180 days. That ICA and one dated June 2, 2007, recited a pending eminent domain take over as the reason for the 90-day term.⁶

5. In addition to practicing at NCC, the Claimant operated a chiropractic business out of his home (the Andover location). At the Andover location, the Claimant provided the same services as those he provided at NCC.⁷

6. While the Claimant was under contract with NCC, he was responsible for procuring his own patients and providing them with chiropractic services. He had a business card that identified him as "John Jesme, DC, Doctor of Chiropractic." The business card showed the Claimant's address as the Lowry Avenue location. The card had two phone numbers: that of the Claimant's cell phone and that of NCC, but NCC was not mentioned on the card. The Claimant also had a second business card, which was for the Andover location. That card had the Claimant's cell phone number and one

² Test. of Claimant.

³ Test. of Claimant.

⁴ Ex. 13; Test. of Claimant.

⁵ The schedule was entered into evidence by the County as Exhibit 103.

⁶ Ex. 13; Test. of Claimant.

⁷ Test. of Claimant.

other phone number.⁸ The Claimant operated his practice as a sole proprietorship, but he did not file a certificate of assumed name with the secretary of state at that time.⁹

7. The Claimant regularly received mail at NCC's address. The mail was addressed to the Claimant as "John Jesme DC".¹⁰ When the Claimant corresponded, he used letterhead that identified him as a Doctor of Chiropractic and listed the addresses for both the Lowry Avenue location and the Andover location. Neither letterhead included NCC's name.¹¹

8. NCC staff handled the billings for services the Claimant provided to his patients at the Lowry Avenue location. The value of NCC providing billing services was considered a part of the overhead Claimant paid before receiving his commission.¹² NCC staff filled out insurance forms for billings to insurance companies. The billings listed "John Jesme DC" as the billing provider at the Lowry Avenue location.¹³ NCC staff received the payments for services rendered by the Claimant. Upon receipt of payments, NCC remitted to the Claimant the amount due him according to the schedule established by the ICA.¹⁴

9. The outdoor building sign at the Lowry Avenue location included the names of NCC and Dr. Greg T. Olson. There was no outdoor sign identifying the Claimant as having a business at the Lowry Avenue location. The Claimant used NCC's examination rooms and equipment, including x-ray machines, but he provided his own chiropractic tools. One exam room was designated for the Claimant's own use. Claimant's patients entered the building through the same entrance as those of NCC, and reported to the receptionist employed by NCC. NCC had one advertised phone number.¹⁵

10. The Claimant paid his own taxes, liability insurance, transportation, and continuing education expenses.¹⁶ For tax purposes, the Claimant filed returns as a sole proprietor on Schedule C of Form 1040 from 2005-2007.¹⁷ NCC issued a 1099 for the commissions the Claimant generated in 2006. The compensation paid to the Claimant is listed as "nonemployee compensation." The State of Minnesota issued a 1099 to the Claimant for 2007, indicating it had made "medical and health care payments" to the Claimant. A 2005 1099 issued by the Auto Club Insurance Association identifies the

⁸ Test. of Claimant; Ex. 1. The second phone number on the Andover location business card was not identified at hearing.

⁹ Test. of Claimant.

¹⁰ Ex. 2; Test. of Claimant.

¹¹ Ex. 3; Test. of Claimant.

¹² Test. of Claimant; Ex. 13.

¹³ Test. of Claimant; Ex. 4.

¹⁴ Ex. 13; Test. of Claimant.

¹⁵ Ex. 102; Test. of Claimant.

¹⁶ Ex. 13; Test. of Claimant.

¹⁷ Exs. 7-9.

Claimant as the recipient of “medical and health care payments,” but the federal identification number in the recipient box is that of NCC.¹⁸

11. The 2005-2007 Schedules C listed the Claimant’s Andover location as his business address. The expense portion of the Schedule C for 2005 does not list any amount for office expense, rent, or utilities, although it includes significant amounts for supplies and communications.¹⁹ For 2006 and 2007, the Schedules C did not include a deduction for rent or utilities, but included significant, office, supply and repair expenses.²⁰ The Claimant’s tax returns for 2005-07 also included Forms 8829 for business use of a home. Those forms indicated that the Andover location, which was then the Claimant’s home, was available for use at all times during the years 2005-2007. On the Forms 8829, the Claimant did not deduct any portion of his income as having been earned at a location other than his home.²¹

12. Evergreen Land Services (ELS) provided relocation services for the Lowry Avenue project. In June 2007, Scott Means, an employee of ELS met with the Claimant regarding the relocation of business conducted at the Lowry Avenue location. Means met with both Dr. Olson and Dr. Jesme about relocation. On June 18, 2007, Means met the Claimant in a parking lot near the Lowry Avenue location. The Claimant had requested a meeting place other than the Lowry Avenue location, which is why the meeting took place in the nearby parking lot. Means proposed the meeting to discuss the residency requirement for relocation benefits. He gave the Claimant a form titled “Certification Concerning Legal Residency in the United States” and asked him to sign it.²²

13. Means told the Claimant he was eligible to receive a benefit for having his personal property moved, but Means did not explain anything about other relocation benefits. Means explained that the Certification form was to ensure that the Claimant was a U.S. citizen or an alien lawfully present in the U.S.²³ When the Claimant signed the Certification form, he checked the box labeled “Residential Displacements,” rather than the box for a sole proprietor lower down under a paragraph labeled “Non-residential Displacements.” The Claimant understood that he was certifying his lawful residency in the U.S., and not asserting that the Lowry Avenue location was his home.²⁴ Means did not believe the Claimant was living at the Lowry Avenue location.²⁵

¹⁸ Test. of Claimant; Ex. 6. The exhibit appears to include a second 1099 from NCC, but most of the printed matter on that 1099 is missing, including the year in which NCC paid the Claimant an amount of \$56,257.00. Both this 1099 and the 1099 for 2006 issued by NCC appear to have a typographical error. The social security number on the two 1099s does not correspond to the one shown on the Claimant’s returns.

¹⁹ Ex. 7.

²⁰ Ex. 8; Ex. 9.

²¹ Exs. 7-9.

²² Test. of Scott Means; Ex. 101.

²³ Test. of S. Means.

²⁴ Test. of Claimant.

²⁵ Test. of S. Means.

14. On November 30, 2007, the Claimant moved from the Lowry Avenue location. He moved his personal property to the Andover location and continued to provide services at the Andover location while he looked for an established practice to purchase. At the time of the move, the Claimant was allowed to take patient records for his own patients. He took about ten such records for patients, although his patient list had about 180 patients on it. The Claimant assumed that most patients would not wish to follow him to the Anoka/Andover area, which is where he wanted to reestablish himself.²⁶

15. The Claimant eventually found an established business to purchase. He then relocated to 2321 Seventh Avenue North in Anoka, Minnesota (the Anoka location). The purchase included equipment, the patient database and the lease for the location.²⁷ The Claimant opened the business as “Anoka Family Chiropractic.” When the Claimant filed his 2008 income tax return, he indicated his place of business as the Anoka location. His Schedule C for that year included deductions for office expense and rent, as well as other expenses.²⁸

16. The Claimant filed with the County claims for commercial moving costs and costs of searching expense for a replacement site. The County disputed the claim, and a contested case was scheduled to hear the dispute. Before hearing, the County concluded that the Claimant was eligible for moving expenses and relocation assistance as a “displaced person.”²⁹ The contested case was then withdrawn.³⁰

17. At some point, the Claimant requested benefits for his reestablishment expenses. The County subsequently obtained additional information from the Claimant and determined that the Claimant did not operate a business separate from NCC. Meanwhile, however, the County had paid the Claimant \$400.00 for moving expenses and, in addition, \$2,500.00 for searching expenses. The County believed the latter payment may have been made in error, but the County did not seek reimbursement.³¹

18. By a Notice of and Order for Hearing dated September 15, 2009, the County commenced a contested case to resolve the issue of whether the Claimant is entitled to payment for his reestablishment expenses as a result of the taking of the Lowry Avenue location. At hearing, the Parties agreed that the only issue is that of entitlement to such expenses and not the amount of those expenses.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

²⁶ Test. of Claimant; Ex. 5; Ex. 12.

²⁷ Test. of Claimant; Ex. 112. Exhibit 112 is the lease for the premises at the Anoka location. The lease term of two years commenced on January 1, 2008.

²⁸ Ex. 10; Test. of Claimant.

²⁹ Ex. 11.

³⁰ Test. of Carol Lezotte-Anderson.

³¹ Ex. 12; Test. of Claimant; Test. of C. Lezotte-Anderson.

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. § 117.52, subd. 4.

2. The Claimant received timely notice of the hearing.

3. The purpose of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (“URA”) is, in part, to ensure that persons displaced as a result of a governmental taking of property for a public project are treated fairly, consistently, and equitably so that such persons are not disproportionately injured as a result of the public project.³²

4. The URA provides at 42 U.S.C. § 4622(a) that:

Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the head of the displacing agency shall provide for the payment to the displaced person of

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

. . .

(3) actual reasonable expenses in searching for a replacement business or farm; and

(4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed \$10,000.³³

5. Under URA, a “displaced person” who must move from a place of business because of a government taking is entitled to payment of actual moving and related expenses.³⁴

6. A “displaced person” is anyone who must move as a consequence of the government taking of property.³⁵ A person means “any individual, family, partnership, corporation or association.”³⁶

³² 42 U.S.C. § 4621 (b); 49 C.F.R. § 24(b). Minn. Stat. §§ 117.50 – 117.56, the Minnesota Uniform Relocation Act (MURA), adopts in part the federal URA to assist persons and businesses that are displaced by the acquisition of their property by a governmental entity.

³³ Minnesota law provides a \$50,000.00 cap on reestablishment benefits. Minn. Stat. § 117.52, subd. 2.

³⁴ 49 C.F.R. §§ 24.301; 24.303.

³⁵ 49 C.F.R. § 24.2 (9). The County has conceded that the Claimant was a displaced person as a result of the acquisition. Ex. 11.

³⁶ 49 C.F.R. § 24.2(21).

7. In addition to the moving and related expenses available under Minn. Stat. §§ 24.301 and 24.303, a small business is entitled to receive a payment for expenses actually incurred in relocating and reestablishing the small business at a replacement site.³⁷ A “small business” is a business that has no more than 500 employees.³⁸ A “business,” as pertinent to this matter, is a lawful activity that is conducted “for the sale of services to the public.”³⁹

8. The Claimant has the burden of proof as to entitlement to relocation and reestablishment benefits.⁴⁰

9. The Claimant has shown, by a preponderance of the evidence, that he conducted a small, independent business at the Lowry Avenue location at the time of its taking and is therefore entitled to relocation and reestablishment expenses.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

Based upon these Conclusions, IT IS HEREBY ORDERED: that the County shall pay to the Claimant any unpaid relocation and reestablishment expenses, to the extent provided by law.

Dated: January 26, 2010

s/Linda F. Close

LINDA F. CLOSE

Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

³⁷ 49 C.F.R. § 24.304.

³⁸ 49 C.F.R. § 24.2 (24).

³⁹ 49 C.F.R. § 24.2 (4).

⁴⁰ Minn. R. 1400.7300, subp. 5.

MEMORANDUM

The Claimant is claiming actual reestablishment expenses under 49 C.F.R. § 304 to compensate him for his move from the Lowry location to the Anoka location. The County posits that the Claimant did not conduct an independent business at the Lowry location and is therefore not entitled to reestablishment benefits under the URA. It bases this position on the absence of outdoor signage identifying the Claimant at the Lowry location; the failure of the Claimant to identify Lowry as the address of his business on his income tax returns; the insufficiency of the ICA to show that the Claimant operated a separate business; and the failure of the Claimant to conduct his business at the Lowry location in the same manner as he conducted his subsequent business in Anoka.

The ALJ concludes that the Claimant has met his burden of proving that he did conduct a business independent of and separate from that of NCC at the Lowry location. Section 304 does not address what happens when two or more businesses at the same location make reestablishment claims. Under section 305, however, a business may make an “in lieu of” reestablishment claim for a fixed amount. Unlike section 304, section 305 does address how to determine whether more than one business at a location is entitled to reestablishment benefits. Although section 305 is not directly involved here, it is instructive on the issue of which displaced businesses are entitled to reestablishment benefits.

Section 305 enumerates factors to be considered to determine whether multiple businesses at a single location are eligible to claim reestablishment benefits. The factors include the extent to which:

- the same premises or equipment are shared;
- substantially identical or interrelated business functions are carried out and business and financial affairs are commingled;
- the entities are held out to the public, and to those customarily dealing with them, as one business;
- the same person or closely related persons own, control, or manage the affairs of the entities.⁴¹

NCC and the Claimant shared premises and equipment at the Lowry location, it is true. But the County ignores that the Claimant had a specific examination room set aside for his exclusive use and that the Claimant used his own chiropractic tools. It is also true that NCC and the Claimant shared business functions such as a receptionist and staff to do billing and collection. These facts, however, flow naturally from the business arrangement the Claimant had with NCC. It was the ability to share staff that made the arrangement beneficial for both NCC and the Claimant. While the County claims that funds were “co-mingled” between the businesses, nothing in the record supports that. The mere fact that NCC staff billed for and collected amounts from the Claimant’s patients does not mean that NCC used the Claimant’s funds as its own. On

⁴¹ 49 C.F.R. § 24.305(b)(1)-(4).

the contrary, the ICA clearly delineated that the commission structure governed which collections belonged to the Claimant and which belonged to NCC.⁴²

The County makes much of the outdoor signage as demonstrating that the Lowry location housed but one business. This ignores the many facts showing that the Claimant operated his own business. The ICA established the Claimant as an independent contractor, and not an employee of NCC. Claimant used his own business cards and his own letterhead in operating his business. The Claimant was expected to establish his own patient base, apparently without help from NCC. The Claimant had to pay his own taxes, for which purposes NCC issued him Form 1099s listing his nonemployee compensation. He received mail under his own name at the Lowry location.

As to the final factor listed in section 305, the Claimant showed that he alone controlled his business. He made all treatment decisions and determined the schedule on which they were to be treated. He billed insurance companies and patients in his own business name. His patients were his alone, not those of NCC. When he left the Lowry location, he was entitled to take all of those patients with him.

All of these facts point to the Claimant's representing himself as a business independent of NCC. They demonstrate that there were two separate businesses at the Lowry location—NCC's and the Claimant's.

The County asks the ALJ to adopt its view that the Claimant was an employee of NCC. In this regard, the Claimant's argument based on *Boily v. Commissioner of Economic Security*, 544 N.W.2d 295 (Minn. 1996) is highly persuasive. *Boily* involved several dentists who claimed reemployment insurance benefits after they separated from a dental clinic owned and operated by another dentist. The Supreme Court found that the dentists were independent contractors, not employees, of the clinic from which they separated. The Court enumerated five factors to determine the status of a person as an independent contractor or an employee. The factors it listed are:

- The right to control the means and manner of performance;
- The mode of payment;
- The furnishing of materials or tools;
- The control of the premises where the work is done; and
- The right of the employer to discharge.⁴³

Applying these factors to the dentists in *Boily*, the Court viewed as indicative of the dentists' independent contractor status the following facts:

1. The clinic owner did not reserve the right to control the manner in which the dentists performed their treatments;
2. The dentists set their own schedules;

⁴² Ex. 103; Ex. 13.

⁴³ *Boily*, 544 N.W.2d at 296.

3. The dentists decided the type of treatment for each patient;
4. Even though the dentists were paid on a monthly basis by the clinic, their compensation was based upon a percentage of their billings attributable to the services each dentist rendered rather than a fixed salary; and
5. Even though the clinic provided the major items of equipment such as patient chairs and drills, each dentist provided their own specific dentistry tools, paid their own malpractice insurance and continuing education fees.⁴⁴

The facts of *Boily* are highly similar to the facts of the Claimant's business arrangement with NCC. NCC did not control how and when the Claimant did his work or reserve in any manner the right to control the Claimant's practice. As in *Boily*, the basis for the Claimant's compensation was monthly collections for services rendered by the Claimant. As in *Boily*, the Claimant used major items of NCC's equipment, but he used his own tools and paid his own malpractice insurance premiums and continuing education expenses. The ALJ sees no difference at all in the application of the *Boily* factors to the independent contractors there and the Claimant. Although the instant case does not involve reemployment insurance benefits, the Court's analysis of the broader question of who is an independent contractor is highly instructive. Based on that analysis, the ALJ concludes that the Claimant ran his own business at the Lowry location.

The County argues that the Claimant has failed to show that his was a small business entitled to reestablishment benefits. In essence, the County seems to maintain that the regulation precludes a sole proprietor, from ever being eligible for reestablishment benefits. By its very nature, a sole proprietorship is operated by an individual. Section 304 does not state that a small business must be organized as a partnership or corporation or any other specific type of entity. Instead, the regulation makes the benefit available to a business that employees 500 or fewer workers, is conducted lawfully, and exists to provide services to the public. There appears to be no basis in law for the County's position. Nor has the County offered any policy reason why one business form should be allowed section 304 benefits and another business form should not.

The County points to the Claimant's filing income tax returns as depicting a position inconsistent with his having a business at the Lowry location. The Claimant filed returns showing his business to be a sole proprietorship. The Claimant's returns listed the Andover location as the business address on the Claimant's Schedules C for the years in question. But the Schedule C provides a place for only one business address, and the Claimant did have a business at the listed Andover location. It thus appears that this fact does not establish an inconsistency in the Claimant's treatment of the Lowry location as a second business location.

The County also points to the Claimant's having attributed all of his income to the Andover location for purposes of the Schedule C deduction for business use of the

⁴⁴ *Boily*, 544 N.W.2d at 296-7.

home. If this treatment was erroneous, the error does not negate the conclusion that the Claimant operated his own business at the Lowry location, even if that fact may have other ramifications that are not relevant here.

At hearing, the Claimant called a relocation expert who opined that the Claimant is unquestionably entitled to benefits for his reestablishment expenses. The expert has worked in the relocation arena since the late '60s, when the URA was in the process of congressional enactment. He continued to work with relocation matters from that time to the present. The expert testified that he had worked on hundreds of relocation cases involving more than one business at the displaced location. When there are multiple businesses at a location, he testified, each is eligible for benefits as a displaced business.

49 C.F.R. § 24.304 makes reestablishment benefits available to small businesses. A small business is defined as “. . . a *business* having not more than 500 employees working at the site being acquired or displaced by a program or project, which site is the location of economic activity.” A “business,” in turn, is defined, in relevant part, as “. . . any lawful activity . . . that is conducted . . . primarily for the sale of services to the public.”⁴⁵

The Claimant operated a small business under the regulation. He was the only person employed at his business, and he conducted his business at a site that was displaced by the Lowry project. His business was lawful and was conducted for the purpose of making chiropractic services available to the public. Once the County acquired the Lowry location, the Claimant was forced to relocate his business. Within two months of leaving the Lowry location, he had discovered a business to acquire and had signed a lease for that new location in Anoka. Under section 304, he is entitled to reestablishment benefits as a small business.

L. F. C.

⁴⁵ 49 C.F.R. § 24.2(a)(4)(ii).